Lee Chin Yong v Medical Defence Malaysia Bhd (Datuk Bandar Kuala Lumpur, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-23NCVC-44–07 OF 2020
QUAY CHEW SOON JC
16 JULY 2021

Civil Procedure — Third party proceedings — Striking out defendant's claim for indemnity from third party — Whether third party was negligent in issuing development order — Whether there was maintainable cause of action against third party — Whether local council had jurisdiction to approve proposed sewerage system — Whether court had power to grant relief sought by defendant — Whether there was triable issue — Whether claim against third party was obviously unsustainable — Whether third party notice should be set aside — Rules of Court 2012 O 16 r 6 & O 18 r 19

This was an application by the third third party ('DBKL') vide encl 48 to set aside the proceedings on the defendant's third party notice dated 30 July 2020 and statement of claim dated 23 September 2020 under O 16 r 6 and O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. The main suit involved a dispute between two neighbours, the plaintiff and the defendant. The plaintiff and the defendant were both purchasers of properties on the secondary market ie, bungalow houses in Taman Bandaraya, Kuala Lumpur. Their properties were situated back-to-back. The dispute arose due to the blockage located within the piping of the underground sewerage system which connected their property to each other. The underground sewerage pipe from the defendant's property went through the plaintiff's property underground before reaching the main sewerage pipe maintained by Indah Water underground on the main road of the residential area. The plaintiff commenced a suit against the defendant claiming that no easement was ever granted for the defendant to flow the sewage from the defendant's property through the plaintiff's property. The plaintiff averred that due to the blockage, the defendant's sewage was being discharged directly into the plaintiff's property. In its statement of defence, the defendant asserted that the sewerage system problem started after the renovation work done on the plaintiff's property. The defendant pleaded that the blockage was due to the said renovation work which caused the defendant's property to be deprived of access to the existing sewerage system. The defendant averred that the connected sewerage system of the defendant's property to the plaintiff's property had existed since their properties were built. The defendant in turn lodged a counterclaim against the plaintiff. In its counterclaim, the defendant sought a declaratory order that the plaintiff was to repair the sewerage system at his

property and rectify the blockage to ensure the flow of sewage from the defendant's property to the public sewerage system was restored. The defendant also prayed for special damages, general damages and exemplary damages. The defendant commenced third party proceedings against DBKL alleging negligence in issuing a development order in February 2012 to the plaintiff to demolish and rebuild his property. The development order was issued by DBKL pursuant to s 70 of the Street, Drainage and Building Act 1974 ('the SDB Act'). DBKL contended that the defendant had no maintainable cause of action against it. The issue for determination of the court was whether the defendant's claim against DBKL was obviously unsustainable and ought to be struck out.

Held, allowing the application with costs:

(1) The defendant's grievance against DBKL was centered around the assumption that DBKL must factor in and approve matters related to sewerage system when issuing the development order and thus, owed a duty of care. That assumption was misplaced and could not stand in law. There was a clear distinction between s 70(2)(a) and s 70(2)(b) of the SDB Act. This difference had a bearing on the dispute and showed that matters relating to sewerage system (approvals, inspections etc) fell outside DBKL's scope of responsibility (see paras 19 & 22).

(2) The defendant's claim against DBKL was obviously unsustainable for the following reasons. The wordings of ss 3 and 45 of the WSI Act read with rr 7 and 9 of the WSI Rules showed that DBKL had no jurisdiction to give any approval under the development order for the plaintiff's new proposed sewerage system. If the defendant's complaints were upheld, it would effectively mean that DBKL would usurp the functions and jurisdiction of Suruhanjaya Perkhidmatan Air Negara ('SPAN'). Secondly, rr 18, 24 and 25 of the WSI Rules specified that any duty to carry out inspection fell on SPAN (and not DBKL). Thus, the defendant's complaint against DBKL in this respect could not stand. If there was failure to carry out inspection of the sewerage system in the plaintiff's property, DBKL was not answerable for the same. Thirdly, based on r 34 of the WSI Rules, DBKL could not be held responsible for any failure of the sewerage system which may have caused the blockage as it was not the party that could be held liable. Fourthly, DBKL was not the regulator duty bound to ensure that the plaintiff adhered to the sewerage plans (see paras 37, 40–42 & 44).

(3) The court found that since DBKL's approval given in the 1970s was deemed to have been approved by the Federal Government via the director general of sewerage services as per s 46(2) of the Act, it followed that any liability arising therefrom would similarly vest with the Federal Government from 1993 onwards and not with DBKL anymore. In light

of this, DBKL could not be said to have acted negligently in the manner in which the defendant put it (see paras 56–57).

(4) The court was of the view that the indemnity sought by the defendant against DBKL could not be granted because the relief that the plaintiff sought was against the defendant in person. DBKL was in no position to give an indemnity on either declaration of rights of the parties inter se or injunctive orders sought to restrain the defendant, as those reliefs were personal to the defendant. Furthermore, the defendant sought a declaratory order that DBKL was to carry out and supervise the immediate repair work of the blockage located within the sewerage system connected to the plaintiff's property and the defendant's property. Such a relief could not be granted in law since DBKL was not cloaked with any powers on matters related to sewerage system. Neither under the SDB Act or the WSI Act was DBKL empowered to carry out remedial works on sewerage system. As such, an additional ground for the court to strike out this action was because it was brought to obtain relief which the court had no power to grant (see paras 68–70).

(5) Having evaluated the statutory law, the inescapable conclusion was that the defendant's claim against DBKL was obviously unsustainable. This issue was capable of resolution without the need for a full trial or taking viva voce evidence during trial. The court was satisfied that the defendant's action against DBKL was bound to fail (see paras 80 & 84).

[Bahasa Malaysia summary

Ini adalah permohonan pihak ketiga ('DBKL') untuk mengenepikan notis pihak ketiga defendan bertarikh 30 Julai 2020 dan penyataan tuntutan bertarikh 23 September 2020 di bawah A 16 k 6 dan A 18 k 19(1)(a), 1(b), 1(c) dan 1(d) Kaedah-Kaedah Mahkamah 2012. Saman di prosiding utama melibatkan pertikaian antara dua jiran, plaintif dan defendan. Plaintif dan defendan adalah pembeli hartanah di pasaran sekunder iaitu rumah banglo di Taman Bandaraya, Kuala Lumpur. Hartanah mereka terletak bersebelahan. Pertikaian timbul akibat halangan yang dipasang di dalam paip sistem pembetungan bawah tanah yang menghubungkan hartanah mereka antara satu sama lain. Paip pembetungan bawah tanah dari hartanah defendan melalui hartanah bawah tanah plaintif sebelum mencapai paip pembetungan utama yang diselenggara oleh Indah Water di bawah tanah di jalan utama kawasan perumahan. Plaintif memulakan saman terhadap defendan atas alasan bahawa tiada kemudahan yang diberikan kepada defendan untuk mengalir kumbahan dari harta defendan melalui hartanah plaintif. Plaintif mendakwa bahawa disebabkan oleh halangan tersebut, kumbahan defendan telah dilepaskan terus ke hartanah plaintif. Di dalam penyataan pembelaannya, defendan menegaskan bahawa masalah sistem pembetungan bermula selepas kerja-kerja pengubahsuaian dilakukan ke atas hartanah plaintif. Defendan menghuajahkan bahawa halangan tersebut disebabkan oleh kerja-kerja

pengubahsuaian yang menyebabkan hartanah defendan terhalang dari sistem pembetungan sedia ada. Defendan mendakwa bahawa sistem pembetungan yang bersambung dengan hartanah defendan dengan hartanah plaintif telah wujud sejak hartanah mereka dibina. Defendan seterusnya mengemukakan tuntutan balas terhadap plaintif. Di dalam tuntutan balasnya, defendan memohon perintah pengisytiharan bahawa plaintif adalah untuk membaiki sistem pembetungan di hartanahnya dan membetulkan halangan tersebut untuk memastikan aliran kumbahan dari harta defendan ke sistem pembetungan awam dipulihkan. Defendan juga memohon ganti rugi khas, ganti rugi am dan ganti rugi teladan. Defendan memulakan prosiding pihak ketiga terhadap DBKL yang didakwa menyebabkan kecuaian di dalam mengeluarkan arahan pembangunan pada Februari 2012 kepada plaintif untuk merobohkan dan membina semula hartanahnya. Arahan pembangunan tersebut dikeluarkan oleh DBKL menurut s 70 Akta Jalan, Parit dan Bangunan 1974 ('Akta JPB'). DBKL menghujahkan bahawa defendan tidak mempunyai sebab tindakan yang boleh dipertahankan. Isu penentuan mahkamah ini adalah sama ada tuntutan defendan terhadap DBKL adalah jelas tidak boleh dipertahankan dan sepatutnya ditolak.

Diputuskan, membenarkan permohonan dengan kos:

(1) Tuntutan defendan terhadap DBKL adalah berdasarkan andaian bahawa DBKL harus mengambil kira dan meluluskan perkara-perkara yang berkaitan dengan sistem pembetungan apabila mengeluarkan arahan pembangunan dan mempunyai tugas berhati-hati. Andaian tersebut adalah salah di sisi undang-undang. Terdapat perbezaan yang jelas antara s 70(2)(a) dan s 70(2)(b) Akta JPB. Perbezaan ini mempunyai kaitan dengan pertikaian inidan menunjukkan bahawa perkara-perkara yang berkaitan dengan sistem pembetungan (kelulusan, pemeriksaan dan lain-lain) berada di luar skop tanggungjawab DBKL (lihat perenggan 19 & 22).

(2) Tuntutan defendan terhadap DBKL adalah jelas tidak boleh dipertahankan atas sebab-sebab berikut. Peruntukan ss 3 dan 45 Akta Industri Perkhidmatan Air ('IPA') yang dibaca bersama k 7 dan 9 Kaedah-Kaedah IPA menunjukkan bahawa DBKL tidak mempunyai bidang kuasa untuk memberi sebarang kelulusan di bawah arahan pembangunan tersebut bagi sistem pembetungan baru plaintif. Sekiranya tuntutan defendan dibenarkan, ia bermakna DBKL akan memasuki bidang kuasa Suruhanjaya Perkhidmatan Air Negara ('SPAN'). Kedua, k 18, 24 dan 25 Kaedah-Kaedah IPA menyatakan bahawa kewajipan untuk menjalankan pemeriksaan terletak di atas SPAN (dan bukan DBKL). Oleh itu, tuntutan defendan terhadap DBKL di dalam hal ini tidak dapat dipertahankan. Sekiranya terdapat kegagalan untuk menjalankan pemeriksaan sistem pembetungan di harta plaintif, DBKL tidak bertanggungjawab untuk perkara tersebut. Ketiga,

berdasarkan k 34 Kaedah-Kaedah IPA, DBKL tidak boleh bertanggungjawab terhadap sebarang kegagalan sistem pembetungan yang mungkin menyebabkan tersumbat kerana mereka bukan pihak yang boleh dipertanggungjawabkan. Keempat, DBKL tidak mempunyai tugas untuk menyelia plaintif untuk mematuhi rancangan pembetungan (lihat perenggan 37, 40–42 & 44).

(3) Mahkamah ini mendapati bahawa sejak kelulusan DBKL yang diberikan pada tahun 1970-an dianggap telah diluluskan oleh Kerajaan Persekutuan melalui ketua pengarah perkhidmatan pembetungan seperti yang diperuntukkan di s 46(2) Akta tersebut, ia mewujudkan tanggungjawab kepada Kerajaan Persekutuan dari tahun 1993 dan seterusnya dan bukannya dengan DBKL lagi. Sehubungan itu, DBKL tidak boleh dikatakan telah bertindak secara cuai kepada defendan (lihat perenggan 56–57).

(4) Mahkamah ini berpendapat bahawa ganti rugi yang diminta oleh defendan terhadap DBKL tidak dapat diberikan kerana relif yang dipohon plaintif adalah terhadap defendan secara peribadi. DBKL bukan berada di dalam kedudukan untuk memberikan ganti rugi sama ada dalam bentuk pengisytiharan hak pihak-pihak atau perintah injunksi yang bertujuan untuk menahan defendan, kerana relif tersebut bersifat peribadi kepada defendan. Selain itu, defendan memohon perintah pengisytiharan bahawa DBKL akan menjalankan dan menyelia kerja-kerja pembaikan segera penyumbatan yang terletak di dalam sistem pembetungan yang berkaitan dengan hartanah plaintif dan hartanah defendan. Relif sedemikian tidak boleh diberikan menurut undang-undang kerana DBKL tidak mempunyai sebarang kuasa dalam perkara-perkara yang berkaitan dengan sistem pembetungan. Baik di bawah Akta JPB atau Akta IPA, DBKL diberi kuasa untuk menjalankan kerja-kerja pemulihan sistem pembetungan. Oleh itu, alasan tambahan bagi mahkamah untuk membatalkan tindakan ini adalah kerana ia dibawa untuk mendapatkan relif yang mahkamah ini tidak mempunyai kuasa untuk memberikannya (lihat perenggan 68–70).

(5) Setelah menilai undang-undang statutori, kesimpulan yang tidak dapat dielakkan adalah bahawa tuntutan defendan terhadap DBKL jelas tidak boleh dipertahkan. Tindakan ini boleh dilupuskan tanpa memerlukan perbicaraan penuh atau menilai keterangan semasa perbicaraan. Mahkamah berpuas hati bahawa tindakan defendan terhadap DBKL tidak bermerit (lihat parenggan 80 & 84).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 2 AMR 1969; [1993] 1 MLRA 611, SC (refd)

Drummond-Jackson v British Medical Association and Others [1970] 1 WLR 688, CA (refd)
DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd [2002] 2 MLJ 11, FC (refd)
Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim [2013] 4 MLJ 173; [2013] 6 CLJ 849, CA (refd)
McKay and Another v Essex Area Health Authority and Another [1982] 1 QB 1166, CA (refd)
Raja Zainal Abidin bin Raja Haji Tachik & 3 Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16; [1993] 3 CLJ 606, SC (refd)
Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601; [2021] 2 CLJ 29, FC (refd)
Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 17A
Rules of Court 2012 O 16 r 6, O 18 rr 19, 19(1)(a), (1)(b), (1)(c), (1)(d)
Sewerage Services Act 1993 (repealed by Water Services Industry Act 2006) ss 3, 31, 46, 46(2), 46(4)
Street, Drainage and Building Act 1974 ss 70, 70(2)(a), (2)(b), 70(3)(c), 77
Suruhanjaya Perkhidmatan Air Negara Act 2006 s 3
Water Services Industry Act 2006 ss 3, 3(2), 45, 45(1), 45(7), 64(1), 66, 186
Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013 rr 7, 9, 18, 24, 25, 34, Schedule 1

Anit Kaur Randhawa (Asbir, Hira Singh & Co) for the defendant.
Jaqdesh Singh (Sofina Thafiqah Zulkifli with him) (Theselim Mohd Yusoff & Co) for the third third party.

Quay Chew Soon JC:

INTRODUCTION

[1] The first third party ('Indah Water') is a national sewerage company entrusted to develop and maintain the sewerage system (including the underground sewerage system) in Malaysia. Indah Water also provide sewerage services such as the collection, conveyance, treatment and disposal of sewage, and includes the operation and maintenance of a sewerage system and the desludging of septic tank.

[2] The second third party ('SPAN') is a body established under s 3 of the Suruhanjaya Perkhidmatan Air Negara Act 2006. SPAN is vested with powers to supervise and regulate water supply services and sewerage services, and to

enforce the water supply and sewerage services laws.

[3] The third, third party ('DBKL') is a body responsible for administration and management of public health, waste disposal, urban planning, environmental protection, economic and social development and general maintenance for urban infrastructure of the Federal Territory of Kuala Lumpur.

[4] DBKL filed an application vide encl 48 ('encl 48') to set aside the defendant's ('D') third party notice dated 30 July 2020 and statement of claimdated 23 September 2020. encl 48 is made under O 16 r 6 and O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012.

[5] D had also instituted third party action against Indah Water and SPAN. However, D has since discontinued its action against Indah Water and SPAN, without liberty to file afresh.

[6] I allowed encl 48 and set aside D's third party proceedings against DBKL. These are the grounds of my decision.

BACKGROUND

[7] The main suit involves a dispute between two neighbours ie the plaintiff ('P') and D. P and D are both purchasers of properties on the secondary market ie bungalow houses in Taman Bandaraya, Kuala Lumpur. Their properties are situated back to back.

[8] The dispute arose as a result of a blockage located within the piping of the underground sewerage system which connects their property to each other. The underground sewerage pipe from D's property go through P's property underground before reaching the main sewerage pipe maintained by Indah Water underground on the main road of Lorong Kemaris 4, Taman Bandaraya, Kuala Lumpur.

[9] P commenced a suit against D claiming no easement was ever granted for D to flow the sewage from D's property through P's property. P avers that due to the blockage, D's sewage is being discharged directly into P's property.

[10] In its statement of defence, D asserts that the sewerage system problem started after the renovation work done on P's property. D pleaded that the blockage was due to the said renovation work which caused D's property to be deprived of access to the existing sewerage system. D avers that the connected sewerage system of D's property to P's property has existed since their properties were built.

[11] D in turn lodged a counterclaim against P. In its counterclaim, D sought a declaration order that P is to repair the sewerage system at his property and rectify the blockage to ensure the flow of sewage from D's property to the public sewerage system is restored. D also prayed for special damages, general damages and exemplary damages.

[12] D commenced these third party proceedings against DBKL because it approved and issued a development order in February 2012 to P to demolish and rebuild his property. The development order was issued by DBKL pursuant to s 70 of the Street, Drainage and Building Act 1974 ('the SDB Act').

THE PARTIES' CASE

[13] D's complaint is that DBKL was negligent in issuing the development order because:

(a) DBKL failed to inspect the existing sewerage system in P's property before issuing the development order;

(b) DBKL failed to assess the impact that the sewerage system in P's property may have on environment before issuing the development order; and

(c) DBKL issued P a certificate of fitness for occupation following the renovation work despite the blockage.

[14] DBKL contends that D has no maintainable cause of action against it because:

(a) DBKL's duties re the development order arises pursuant to the SDB Act and the Bylaws enacted thereunder, namely the Uniform Building By-Laws 1984 ('the Bylaws');

(b) all matters relating to sewerage system do not fall under the SDB Act and DBKL has no power to issue any approvals for the same;

(c) therefore, it is not on DBKL to carry out the matters that D complains of prior to the issuance of the development order;

(d) the legislation governing sewerage system is the Water Services Industry Act 2006 ('the WSI Act') read together with the Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013 ('the WSI Rules');

(e) the statutory authority in charge of all matters related to sewerage system is SPAN. This is as per s 3 and 45 of the WSI Act read with rr 7, 9, 18, 24 and 25 of the WSI Rules; and

A (f) thus, it is SPAN (and not DBKL) who is the body responsible to carry out the actions that D complains of. As such, D's grievances should be channelled to SPAN and DBKL cannot be liable.

B **[15]** In January 2012, P (via his architect) applied to DBKL for permission to demolish and rebuild P's premises. Amongst the plans submitted were plans of a new proposed sewerage system to be built in P's property. DBKL did not process these particular plans which concerned P's new proposed sewerage system as it had no jurisdiction to do so and instead, marked them with the words 'DIBATALKAN'.

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[16] In February 2012, DBKL issued the development order. It is DBKL's position that the development order excludes any approval of P's new proposed sewerage system since DBKL has no jurisdiction to approve the same. The D renovation work was completed circa 2017. However, no certificate of fitness for occupation has been issued to date.

[17] In December 2019, D learnt of the blockage located within the piping of the underground sewerage system which connects its property to P's E property. D pleaded that the blockage arose after the renovation work was carried out. It is D's case that but for DBKL's negligence in issuing the development order, the blockage would not have occurred.

DECISION

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[18] I am satisfied that D's claim against DBKL is obviously unsustainable. It is plain and obvious to me that D's action against DBKL ought to be struck out (see the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] G 2 AMR 1969; [1993] 1 MLRA 611). My reasons are as follows.

NO DUTY ON DBKL AS ALLEGED BY DEFENDANT GIVEN THE PROVISIONS OF THE STREET, DRAINAGE AND BUILDING ACT 1974

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[19] D's grievance against DBKL is centred around the assumption that DBKL must factor in and approve matters related to sewerage system when issuing the development order and thus, owes a duty of care. This assumption is misplaced and cannot stand in law.

I

[20] The development order was given in February 2012 pursuant to s 70 of the SDB Act. Thus, the provisions of the SDB Act are applicable to determine whether there is such a duty on DBKL. This is because DBKL derives its powers from the SDB Act.

[21] Section 70(2)(a) and (b) of the SDB Act is relevant because it is the starting point for the issuance of the development order (which is at the nub of D's complaint). It reads:

> 70 (2) Any person who intends to erect any building shall cause to be submitted by a principal submitting person or submitting person —
>
> (a) to the local authority such plans and specifications as may be required by any by-law made under this Act;
>
> (b) to the r*elevant statutory authority* such plans and specifications as may be required by *any other written law*;

[22] There is a clear distinction between s 70(2)(a) ('sub-s (a)') and s 70(2)(b) ('sub-s (b)') of the SDB Act. This difference has a bearing on the dispute and show that matters relating to sewerage system (approvals, inspections etc) fall outside DBKL's scope of responsibility. This is because:

(a) under sub-s (a), one who intends to erect a building must submit to DBKL (the local authority) such plans as required under the Bylaws made pursuant to the SDB Act;

(b) in contrast, under sub-s (b), one who intends to erect a building must also submit to the 'relevant statutory authority' such plans as required by 'any other written law'. This is an additional requirement over and above sub-s (a);

(c) it is apparent that DBKL is to consider and approve only such plans and specifications that may be required under the Bylaws;

(d) there is nothing in the Bylaws enacted pursuant to the SDB Act which discuss 'sewerage system';

(e) as such, DBKL has no jurisdiction to consider or approve anything related to 'sewerage system'. Any approval would be ultra vires the SDB Act as DBKL would be exercising powers which it does not possess;

(f) this point is supported by the fact that DBKL did not process the plans labelled 'Diagramatik Susunatur Pembentungan Dalaman' and 'Diagramatik Susunatur Bekalan Air Dalaman' submitted by P when applying for the development order. Instead, DBKL wrote the words 'DIBATALKAN' on them;

(g) the word 'DIBATALKAN' meant that DBKL did not consider these specific plans in issuing the development order. This is rightly so since those plans relate to 'sewerage system', which do not come within the purview of DBKL under the SDB Act; and

(h) consequently, since DBKL need not consider or approve matters pertaining to sewerage system prior to issuing the development order, D's complaint cannot stand because:

A (i) there is no duty in law on DBKL to inspect the pre-existing sewerage system in P's property before issuing the development order, as D alleges;

(ii) there is also no duty in law on DBKL to assess the impact that the B sewerage system in P's property may have in environment before issuing the development order, as D alleges; and

(iii) the development order does not constitute DBKL's approval of the new sewerage system which P plans to build because DBKL did not have the power to give any such approvals.

C (i) applying sub-s (b), it fell on P to submit those plans labelled 'Diagramatik Susunatur Pembentungan Dalaman' and 'Diagramatik Susunatur Bekalan Air Dalaman' to the 'relevant statutory authority' (and not DBKL) as required by 'any other written law' for approval.

D **[23]** Section 3 of the SDB Act defines 'sewerage system' as follows:

'sewerage system' has the same meaning assigned to it under the Sewerage Services Act 1993;

E **[24]** The Sewerage Services Act 1993 ('the Sewerage Services Act') was enacted 28 years ago to consolidate the laws relating to sewerage system from the local councils throughout Malaysia, such as DBKL, and vest it with the Federal Government. In other words, the Federal Government would take over F everything related to sewerage system from local councils. This includes the Federal Government taking over all rights and liabilities from the local councils, DBKL included.

[25] Section 3 of the Sewerage Services Act stipulates that the Federal G Government, exercising its powers through the Director General of Sewerage Services, shall have authority and purview over sewerage related matters. It reads:

The Federal Government shall, upon coming onto operation of this Act, have executive authority with respect to *all matters relating to sewerage systems and sewerage* H *services throughout Malaysia*.

[26] When the Sewerage Services Act was introduced, sub-s (b) of the SDB Act was amended as follows in 1993 to synchronize itself with the Sewerage Services Act:

I 70(2) Any person who intends to erect any building shall submit —

(a) to the local authority such plans and specifications as may be required by any bylaws made under this Act;

(b) to the relevant statutory authority such plans and specifications *in respect*

of the sewerage system as may be required by any other written law. A

[27] Subsequently, the Sewerage Services Act was repealed and replaced by the WSI Act. Accordingly, the WSI Act would be the applicable legislation in this matter. When the WSI Act was introduced, sub-s (b) of the SDB Act was amended in 2007 into its current form to bring it in harmony with the WSI Act. B

[28] Via the 2007 amendment, the words 'in respect of the sewerage system' was removed from the amended sub-s (b) of the SDB Act. This appears to widen the scope of sub-s (b) and not restrict it to only plans relating to 'sewerage system'. C

THE WATER SERVICES INDUSTRY ACT 2006 IS APPLICABLE AND THE PARTY RESPONSIBLE TO CARRY OUT INSPECTIONS AND ENVIRONMENTAL IMPACT ASSESSMENTS WOULD NOT BE DBKL D

[29] If the SDB Act does not apply, what then is the 'any other written law' which governs sewerage system and who is the 'relevant statutory authority' pursuant thereto? The answer is this. The written law governing sewerage system would be the WSI Act. And the relevant statutory authority pursuant thereto would be SPAN, the 'Commission' referred to in the WSI Act. E

[30] The WSI Act came into force on 1 January 2008 and replaced the Sewerage Services Act. Since P applied for the development order in January 2012, the WSI Act is applicable as it was (and still is) the operative legislation. F

[31] Section 3(2) of the WSI Act stipulates that the Federal Government shall continue to have authority with respect to all matters relating to sewerage systems and sewerage services throughout Malaysia. And will exercise its authority through SPAN. Arising therefrom, s 45 of the WSI Act stipulates that SPAN is responsible to give approvals regarding the construction of sewerage system. G

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[32] Section 45(1) of the WSI Act reads:

> No person shall *construct, alter, modify*, disconnect or close up a water supply system, sewerage system, septic tank, individual internal sewerage piping or *common internal sewerage piping* unless the relevant plans or specifications which requires the approval of the Commission have first been approved in writing by the Commission. I

[33] It appears P should have submitted the plans labelled 'Diagramatik Susunatur Pembentungan Dalaman' and 'Diagramatik Susunatur Bekalan Air

Dalaman' to SPAN (and not DBKL) for SPAN's consideration. Thereafter, SPAN (as the approving authority) was to do the needful (such as carrying out any inspection of the existing sewerage system or conducting any environmental impact assessment) before issuing its approval to P.

[34] Under s 45(1) of the WSI Act, the approval of any local authority, such as DBKL, is not needed when considering any application pertaining to sewerage system. All that is necessary is for SPAN's approval and DBKL plays no part in the process.

[35] Under s 45(7) of the WSI Act, it is a criminal offence for anyone to construct, alter or modify a sewerage system without first securing approval from SPAN.

[36] Section 45(1) of the WSI Act is to be read together with the WSI Rules, the applicable rules for the planning, design, construction and inspection of sewerage system. The following WSI Rules are relevant and have a bearing on D's grievances:

(a) rule 7 stipulates that 'the competent person shall apply to the Commission for the *approval* of sewerage planning for sewerage works or septic tank works';

(b) a 'competent person' is defined as an architect or engineer, as per Schedule 1 of the WSI Rules;

(c) rule 6(3) sets out the factors that should be taken into account when planning for sewerage works. Amongst those factors are the layout and location of the sewerage system, the connection point to the existing sewerage system and the integration of the proposed sewerage works with the existing sewerage system;

(d) rule 9 stipulates that 'the Commission may *approve* the sewerage planning or the amended sewerage planning and may impose such terms and conditions as it deems fit';

(e) rule 18(1) stipulates that 'the Commission or any person authorised by the Commission may *inspect* the sewerage works or septic tank works at any time deemed necessary by the Commission';

(f) rule 24(1) discusses intermediate inspection and stipulates that 'the competent person shall notify the Commission when the sewerage works will be ready for intermediate *inspection*';

(g) rule 25 stipulates that 'upon the completion of the sewerage works, the competent person shall notify the Commission of the date for final *inspection* of the sewerage works';

(h) rule 27 stipulates that SPAN 'may issue a letter of confirmation if the Commission is satisfied that the sewerage works or the septic tank works has been constructed in accordance to these Rules'; and

(i) rule 34 stipulates that notwithstanding any approval, inspection or certification by the Commission, the '*competent person shall be wholly responsible* for the design, quality of construction and installation of the sewerage works and the septic tank works and *shall remain liable* for any defects or failure in the design, construction and installation of the sewerage works and septic tank works including defects or failure in treatment process and structural stability'.

[37] It is my finding that D's claim against DBKL is obviously unsustainable for the following reasons.

[38] Firstly, ss 3 and 45 of the WSI Act and rr 7 and 9 of the WSI Rules specify that it is SPAN (and not DBKL) who has the sole jurisdiction and power to grant approval for the construction of sewerage system. Therefore, as the approving authority, any necessity to inspect the existing sewerage system or to carry out an environmental impact assessment of the existing sewerage system in P's property rests on SPAN (and not DBKL).

[39] The issuance of the development order stands separate from SPAN's approval of P's new proposed sewerage system. Both are governed by different legislation. The approval of one does not equate to the approval of the other.

[40] The wordings of ss 3 and 45 of the WSI Act read with rr 7 and 9 of the WSI Rules show that DBKL has no jurisdiction to give any approval under the development order for P's new proposed sewerage system. If D's complaints were upheld, it would effectively mean that DBKL will usurp the functions and jurisdiction of SPAN.

[41] Secondly, rr 18, 24 and 25 of the WSI Rules specify that any duty to carry out inspection falls on SPAN (and not DBKL). Thus, D's complaint against DBKL in this respect cannot stand. If there was failure to carry out inspection of the sewerage system in P's property, DBKL is not answerable for the same.

[42] Thirdly, r 34 of the WSI Rules specify that the 'competent person' (and not DBKL) shall be entirely responsible and liable for any failure in the design, construction of installation of the new sewerage system in P's property. This is relevant since D complains that the renovation work caused the blockage.

[43] The 'competent person' would be the architect who signed off on the relevant plans for P's new proposed sewerage system. Based on r 34 of the WSI, DBKL cannot be held responsible for any failure of the sewerage system which may have caused the blockage as it is not the party that can be held liable.

[44] Fourthly, D contends that DBKL 'ought to have regulated that P or his agents did not continuously block D's property's connection to the underground connected sewerage system and hold true to its undertaking in the plans'. This complaint is untenable since DBKL is not the regulator duty bound to ensure that P adheres to the sewerage plans. Nothing turns on the fact that DBKL did not take any action because DBKL is not cloaked with the power to do so in the first place.

[45] This is bolstered by s 64(1) of the WSI Act which empowers SPAN to take steps to rectify any issue that may arise from sewerage system. It reads:

> 64 Power to require private sewerage system, etc, to be put in proper order
>
> (1) If the Commission is satisfied that —
>
> (a) a *private sewerage system*, septic tank, individual internal sewerage piping or *common internal sewerage piping* on any premises or which serves any premises; or
>
> (b) a *private connection pipe* connecting any premises to a public sewerage system,
>
> is defective or is not properly maintained or is *in need of repair*, the Commission may issue a direction to the *owner*, management corporation or *occupier* of such premises or the owner of or the management corporation responsible for the private sewerage system, septic tank, individual internal sewerage piping, common internal sewerage piping or private connection pipe to have such private sewerage system, septic tank, individual internal sewerage piping, common internal sewerage piping or private connection pipe *repaired or put in proper order* within the period specified in the direction.

[46] Further, s 66 of the WSI Act stipulates that the owner of any private sewerage system which 'is so foul or is in such a state or so situate as to be a nuisance or a danger to health' commits a criminal offence. SPAN may direct the owner or occupier of the premises 'to abate such nuisance, harm or danger'. Failing which, SPAN 'may abate such nuisance, harm or danger and the expenses incurred by the Commission' shall be borne by the owner or occupier of the premises.

[47] Such provisions are absent from the SDB Act. This demonstrates that the relevant regulator with regard to sewerage system is not DBKL.

DBKL CANNOT BE HELD LIABLE FOR ANY APPROVAL GIVEN IN THE 1970S

[48] P and D came to own their respective properties around 2013. Their properties are located in an area built and developed by one Bandaraya Developments Sdn Bhd in the 1970s. The existing sewerage system which came with their properties was constructed in the 1970s. DBKL approved the design of the existing sewerage system in the 1970s.

[49] D contends that P and D inherited the sewerage system approved by DBKL in the 1970s when they came to own their properties in 2013. Since DBKL approved the same back in the 1970s, it is the body responsible for the existing sewerage system, even up to this day. Therefore, DBKL must be held accountable for all issues arising out of it, including the present blockage.

[50] D's contention is devoid of merit. The legislation governing sewerage system has evolved twice, once in 1993 and again, in 2006. This progress in legislation has an impact on the present dispute.

[51] Prior to 1993, DBKL was cloaked with the authority to grant approval for sewerage system, pursuant to certain provisions of the SDB Act then. But this changed in 1993 with the enactment of the Sewerage Services Act. By virtue of s 3 of the Sewerage Services Act, the Federal Government would have executive authority over everything related to sewerage system.

[52] Accordingly, the SDB Act was amended in 1993 to remove these powers from DBKL since these powers had now shifted and vested with the Federal Government. Section 46 of the Sewerage Services Act is material as it is the 'savings and transitional' provision. It is the 'bridge' between the old provisions of the SDB Act which originally governed sewerage system (which were removed in 1993) and the newly enacted Sewerage Services Act which took over.

[53] Section 46 of the Sewerage Services Act reads:

> 46 Savings and transitional
>
> (1) Nothing shall affect the past operation of, or anything done under the provisions of, any law relating to sewerage systems and services passed before the date of coming into operation of this Act.
>
> (2) *Any plans* or specifications in respect of any sewerage system or septic tank *approved under any other written law before* the date of coming into operation of this Act *shall be deemed to have been approved under section 31*.
>
> (3) The provisions of subsections 32(1) and (2) shall not apply to any person who, on the date of coming into operation of this Act, was carrying on any

A of the acts described in subsection 32(1) until the expiration of six months from that date or the final determination of his application for a licence under this Act, whichever is the later.

(4) Notwithstanding subsection (1), *any* right, liberty, privilege, *obligation or liability existing immediately before* the date of coming into operation of this Act by virtue of any law relating to sewerage systems or sewerage services in force before that date *shall, except as may be expressly provided in this Act, be subject to the provisions of this Act*.

[54] Based on s 46(2) above, DBKL's approval given in the 1970s would now be deemed to have been approved by the Federal Government pursuant to s 31 of the Sewerage Services Act. Section 31 of the Sewerage Services Act reads:

31 Approval required for construction of sewerage system or septic tank

(1) No person shall construct any sewerage system or septic tank without the prior written permission of the Director General approving the plans and specifications of the proposed sewerage system or septic tank.

[55] Further, based on s 46(4) above, all liabilities of DBKL arising prior to the Sewerage Services Act shall be subject to the provisions of the Sewerage Services Act. There is no mention about any residual liabilities that local councils may have to shoulder. It stands to reason that no liability can arise against DBKL, more so given s 46(2) above.

[56] Reading both together, since DBKL's approval given in the 1970s is deemed to have been approved by the Federal Government via the Director General of Sewerage Services as per s 46(2), it follows that any liability arising therefrom would similarly vest with the Federal Government from 1993 onwards. And not with DBKL anymore, as D contends.

[57] By virtue of s 46 of the Sewerage Services Act, DBKL cannot be held liable for any approval it gave in the 1970s. As any responsibility or liability thereto is deemed to be taken over by the Federal Government in 1993. In light of this, DBKL cannot be said to have acted negligently in the manner in which D puts it. This resonates with the underlying objective of the Sewerage Services Act, which was for the Federal Government to take over and become the exclusive authority with regard to sewerage system.

[58] In *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601 at p 616; [2021] 2 CLJ 29 at p 44, the Federal Court held that the interpretation and construction of any written law shall have regard to the underlying purpose or object of the legislation in question.

[59] Such purposive approach is given statutory recognition by s 17A of the Interpretation Acts 1948 and 1967 which reads:

> 17A Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would *promote the purpose or object underlying the Act* (whether that purpose or object is expressly stated in the Act or not) *shall be preferred* to a construction that would not promote that purpose or object.

[60] In pursuing the purposive approach, one of the matters that can assist the court is to refer to the Parliamentary reports or Hansard (see the Federal Court case of *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd* [2002] 2 MLJ 11 at p 21).

[61] When the Sewerage Services Bill 1993 was debated in Parliament on 22 July 1993, the Minister for Housing and Local Government, who proposed the Bill, stated the following:

> Perkara pembentungan sebagai perkara bersama di antara Kerajaan Persekutuan dan Kerajaan Negeri juga telah menimbulkan beberapa masalah seperti persoalan pembiayaan projek, pertindihan tugas dan kuasa serta kekurangan dasar seragam yang diamalkan.
>
> ...
>
> Tuan Yang di-Pertua, memandangkan bahawa setakat ini masalah perkhidmatan pembentungan tidak dapat diatasi dengan memuaskan oleh pihak berkuasa tempatan maka *Kerajaan Persekutuan telah memutuskan untuk mengambilalih tanggungjawab terhadap semua perkara yang berkaitan dengan sistem dan perkhidmatan pembentungan daripada pihak berkuasa tempatan*.
>
> ...
>
> Tuan Yang di-Pertua, sejajar dengan p*engambilalihan tanggungjawab terhadap sistem pembentungan* adalah wajar semua *aset alih dan aset tidak alih* seperti tanah serta sistem pembetungan dan *hutang piutang* pihak berkuasa tempatan berkaitan dengan pembetungan *yang sedia ada juga diambil alih* oleh Kerajaan Persekutuan.

[62] It seems that the oversight and management of existing sewerage system prior to 1993 was facing a multitude of problems as it was fragmented. Thus, the underlying purpose or object of the Sewerage Services Act was to consolidate everything centrally with the Federal Government to enable management and control to be uniform. To achieve this objective, the Federal Government would take over all the rights, obligations, assets and liabilities which were vested with the local councils at that time.

[63] In regard to liabilities, the Federal Government would take over the local council's existing debts ('hutang piutang'). It seems to me that the Federal Government would also have had to take over any liabilities arising out of

approvals related to sewerage system given by local councils prior to 1993. If such liabilities were not taken over, then the underlying object of the Sewerage Services Act may not be achieved because there would still exist residual issues against local councils. Which runs contrary to the purpose of the Sewerage Services Act to have the Federal Government become the umbrella body.

[64] To complete the picture, since the Sewerage Services Act was replaced by the WSI Act in 2006, all liability arising out of DBKL's approval given in the 1970s (which originally became vested with the Federal Government in 1993 via the Sewerage Services Act) would be passed on to SPAN because SPAN is now in charge of sewerage system.

[65] The 'savings' provision in s 186 of the WSI Act reads:

> 186 Savings
>
> Subject to Chapter 2 of this Part, any registration, instruction, act, order, direction, approval or decision done, made or given before the appointed date under any written law relating to —
>
> (a) water supply system or sewerage system; and
>
> (b) water supply services or sewerage services,
>
> which is consistent with this Act shall be deemed to have been done, made or given under this Act and shall continue in full force and effect in relation to whom they apply until amended or revoked under this Act or its subsidiary legislation or until the date of the expiry of the registration, instruction, act, order, direction or decision.

RELIEF SOUGHT BY DEFENDANT AGAINST DBKL CANNOT BE GRANTED AS A MATTER OF LAW

[66] DBKL is essentially being asked to indemnify D from all of P's claims. In its statement of claimagainst DBKL, D prayed for the following reliefs:

(a) full indemnity by DBKL on any claims by P as stated in his statement of claimagainst D;

(b) a declaration order that DBKL carries out and supervise the immediate repair work of the sewerage system at P's property in order to ensure the flow of the sewerage system from D's property to the public sewerage system is restored; and

(c) general damages, interest and cost.

[67] The primary relief sought by P against D is declaratory and injunctive. In his statement of claim, P prayed for the following reliefs:

(a) a declaration that there is a blockage in D's sewerage system and P is not responsible for the blockage;

(b) a declaration that D and its agent have no right to access or use the private sewerage system located within P's property;

(c) an injunction to restrain D and its agent from accessing or using the private sewerage system located at P's property;

(d) an injunction for D to install private septic tank in D's property or alternatively to connect D's sewerage system directly to the public sewerage system;

(e) an order to prevent D and its agent from releasing any spillage of sewage into P's property; and

(f) damages, interest and cost.

[68] In my opinion, the indemnity sought by D against DBKL cannot be granted because the relief that P seeks is against D in person. For instance, the declarations sought relates to the rights of P and D inter se. DBKL is in no position to give an indemnity on either declaration of rights of the parties inter se or injunctive orders sought to restrain D, as those reliefs are personal to D.

[69] Furthermore, D seeks a declaration order that DBKL is to carry out and supervise the immediate repair work of the blockage located within the sewerage system connecting P's property and D's property. Such a relief cannot be granted in law since DBKL is not cloaked with any powers on matters related to sewerage system. Neither under the SDB Act or the WSI Act is DBKL empowered to carry out remedial works on sewerage system.

[70] As such, an additional ground for me to strike out this action is because it is brought to obtain relief which the court has no power to grant. I refer to the Court of Appeal case of *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 at p 680 which said:

> There is an added dimension to O 18 r 19(1), in that the court will also strike out 'if the action has been brought to solely to obtain relief which the court has no power to grant' ... or if relief be asked on a ground which is no ground for such relief.

OTHER ARGUMENTS BY DEFENDANT

[71] D argued that DBKL ought to first ensure that SPAN gave its approval re P's new sewerage system before the development order is issued for the renovation work. Since DBKL issued the development order before SPAN's approval, it is in breach of s 70(3)(c) of the SDB Act which reads:

> (3) No plans for the erection of a building shall be approved —

A ...

(c) before any other conditions which the local authority may deem necessary to impose have been complied with.

B **[72]** This point, however, was never pleaded in either D's statement of claim against DBKL or its affidavit to oppose encl 48. On this score alone, I would be entitled to disregard the argument. Nevertheless, I considered this point and concluded it was misconceived. Section 70(3)(c) of the SDB Act does not apply on the facts of the present case. There is no condition imposed by DBKL that C SPAN's approval re sewerage systems must first be secured before the development order is issued. There is nothing in the SDB Act or the Bylaws which require this.

D **[73]** The development order stands on its own and independent of any approval given by SPAN. It is not inter-dependent or contingent thereto, as D puts it. In the absence of such a condition being imposed by DBKL, the issue of compliance does not arise. It is also not for DBKL to 'force' P to secure any other approval needed. Instead, it behoves P to secure all requisite approvals from all relevant regulators before carrying out the renovation work.

E

[74] D says there is no evidence as to whether SPAN did give any such approval and that this is a triable issue. However, whether any approval from SPAN was secured in this case is for P to explain. If at all, it is a triable issue between P and D. It is not a triable issue against DBKL.

F

[75] D referred to s 77 of the SDB Act which reads:

> No building shall be erected over any public sewer, private connection pipe, public surface or storm water drain, culvert, water-course, river or stream or any water G main, electric cable or wire without the prior written permission of the local authority *or the controlling statutory authority concerned* as the case may be.

[76] D argues that since 'public sewer' and 'private connection pipe' come within s 77 of the SDB Act, it is for DBKL to first give its written permission H to P before he can erect his property over these 'public sewer' and 'private connection pipe'. With respect, this argument is erroneous.

[77] Section 77 of the SDB Act applies to a variety of infrastructure such as storm water drain, culvert, river, stream, water pipe, electric cable etc, some of I which do not come under the purview of DBKL. As such, s 77 of the SDB Act is worded widely to ensure appropriate permission is secured from either the local authority 'or the controlling statutory authority concerned', as the case may be. DBKL is not the controlling statutory authority in relation to 'public sewer'.

[78] D argues that DBKL 'possess documents that may shed light on the matter' and thus, should remain as a party since there may be liability attributable to them. However, it is entirely open to D to subpoena DBKL's personnel to appear as witness and produce relevant documents. D cannot go on a 'fishing expedition' by naming DBKL in the hope that some liability may arise and be affixed against DBKL at the end.

PLAIN AND OBVIOUS CASE

[79] At this interlocutory stage, I refrain from making any determination concerning the merits or otherwise of P's claim or D's defence and counterclaim. I make no finding regarding the sewerage system problem as to what caused it and who is liable to rectify the problem. Whether it be P or his architect or contractor, D, Indah Water or SPAN. My only finding is that DBKL is not answerable with respect to the matters alleged by D.

[80] In arriving at my decision, I have examined the applicable legislation. I do not see that as an impediment to employing the summary process of setting aside the third party action against DBKL. The material facts insofar as DBKL is concerned are not substantially disputed. I did not conduct a trial on conflicting affidavit evidence. Having evaluated the statute law, the inescapable conclusion is that D's claim against DBKL is obviously unsustainable. This issue is capable of resolution without the need for a full trial or taking viva voce evidence during trial. I am guided by the following principles.

[81] Whether it is plain and obvious that a suit should be struck out does not depend on the length of time it takes to argue an application to strike it out. Rather the question is whether, when the point has been argued, it becomes plain and obvious that there can be but one result. It can become plain and obvious that a claim cannot succeed after a relatively long and elaborate hearing (see the English Court of Appeal cases of *McKay and Another v Essex Area Health Authority and Another* [1982] 1 QB 1166 at pp 1176–1177; *Drummond-Jackson v British Medical Association and Others* [1970] 1 WLR 688 at pp 695–696).

[82] Thus in a suit involving complex questions of law but where the essential facts are not in dispute, the complexity of the questions of law should not be a reason for refusing relief under O 18 r 19 of the Rules of Court. If the court is satisfied that the questions of law are unarguable, the court is not prevented from granting summary relief merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see the Court of Appeal case of *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173 at p 182; [2013] 6 CLJ 849 at p 859).

[83] In *Raja Zainal Abidin bin Raja Haji Tachik & 3 Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 at p 24; [1993] 3 CLJ 606 at pp 611–612, the Supreme Court remarked that the lower court should have scrutinized the evidence in order to decide whether the action was bound to fail. The court held that an action can be summarily disposed if there is an absence of conflict of material evidence or of conflict of affidavits on material points. So that seemingly triable or difficult issues could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

CONCLUSION

[84] For the reasons above, I am satisfied that D's action against DBKL is bound to fail. I therefore allowed encl 48 and set aside D's third party action against DBKL. I ordered D to pay costs of RM5,000 to DBKL.

Application allowed with costs; third party notice set aside.

Reported by Muhamad Azham Marwan